

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

ORIGINAL

77-4033

United States Court of Appeals
FOR THE SECOND CIRCUIT

HUDSON TRANSIT LINES, INC.,

Petitioner,

against

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF
AMERICA and MONSEY TRANSPORTATION CORP.,

Respondents,

ROCKLAND COACHES, INC.,

Intervenor.

ON PETITION FOR REVIEW OF ORDER OF THE INTERSTATE
COMMERCE COMMISSION

REPLY BRIEF FOR HUDSON TRANSIT LINES, INC.,
PETITIONER, and ROCKLAND COACHES, INC.,
INTERVENOR

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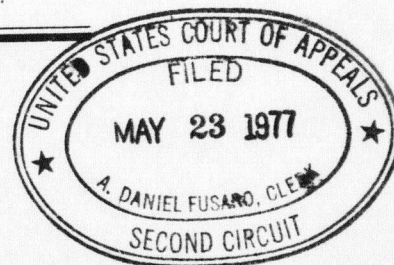


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PRELIMINARY STATEMENT

This reply is respectfully submitted to the separate briefs filed by Respondent, Interstate Commerce Commission (Commission) and Respondent, Monsey Transportation Corp. (Applicant).

In view of the fact that neither of the respective briefs have addressed the seminal issue in this proceeding, namely that the record, the applicant's pleadings, and the Commission's orders are unequivocal as to the fact that the Applicant will confine its service solely and exclusively to the orthodox Jewish persons who are members of the Hassidic sect and who belong to certain congregations and Yeshivas so that the proposed service within the statutory definitions legally constitutes contract as opposed to common carriage, this reply will merely briefly address certain issues presented in the respective briefs of the Commission and the Applicant.

It would appear, however, that perhaps the reversible error in this proceeding is best illustrated by the fact that the Commission has here approached this issue pertaining to the transportation of passengers as if the case involved the transportation of property. Aside from the fact that the legislative changes discussed in Petitioner's brief pertaining to contract carriage arose as a result of decisions involving property transportation (U.S. v. Contract Steel Carriers, 350 U.S. 409 (1956)), the fact is that an administrative agency in exercising its discretion must of necessity draw a distinction applying statutory

provisions between property and passenger transportation. This is particularly true with regard to the definition of contract carriage in Section 203 (a)(15) of the Interstate Commerce Act (49 U.S.C. 303 (a)(15)). Significantly, in other situations, the Commission has repeatedly time and time again distinguished passenger transportation from property transportation in interpreting and in applying the statutory provisions. Thus, the Commission has interpreted the statutory provisions pertaining to commercial zones and terminal areas so as not to apply same to passenger transportation. ExParte MC-37, Commercial Zones and Terminal Areas, 54 M.C.C. 615; Administrative Ruling No. 102, 82 M.C.C. 581. So too, the Commission has drawn a clear distinction with regard to the incidental to air surface transportation exemption provided for in Section 203 (b) (7a) of the Interstate Commerce Act, 49 U.S.C. 303(b)(7a). Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71; Motor Transportation of Passengers Incidental to Transportation by Aircraft, 95 M.C.C. 526, aff'd; National Bus Traffic Association v. U.S., 249 F. Supp. 869 (D.C., Ill.)

REPLY TO BRIEF OF MONSEY TRANSPORTATION CORP.

The brief submitted by Applicant confirms the position of Petitioner and Intervenor that the Applicant does not contemplate making available a service to the general public and that the service is geared

to the "daily religious practices enjoined upon all orthodox Jews."

It is significant that the Applicant still seems to be confused as to the service it will be required to make available as a common carrier as opposed to a contract carrier. To be sure, it should make no difference to the Applicant since it seeks only to serve members of the orthodox Jewish faith that it should receive a permit as a contract carrier under Section 209 of the Interstate Commerce Act (49 U.S.C. 309) as opposed to a certificate of public convenience and necessity under Section 207 of the Interstate Commerce Act (49 U.S.C. 307).

The Applicant has failed totally to address the issues pertaining to the interpretation which is to be placed on the term "common carriage" as defined in Section 203(a)(14) of the Interstate Commerce Act 49 U.S.C. 303(a)(14). To be sure, the definition of the term "contract carriage" as set forth in Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15) specifically by definition excludes common carriage. Nevertheless, in the instant proceeding, the Commission engaged in reverse reasoning, namely first finding that the proposed contract carrier service does not constitute contract carriage when in fact the issue to be addressed initially was whether or not the proposed service constituted common carriage.

In this connection, with regard to the cases advanced by Applicant, the long and short of the matter is that cases such as Vaughn

Gallop, Extension - Fertilizer, 73 M.C.C. 433 involve the transportation of property as opposed to passengers. The fact that some party has received authority to transport fertilizer or some other commodity has no bearing on the issues in this proceeding when in fact the authority to transport fertilizer relates to all members of the public whereas here we are concerned with a request which is restricted in essence to a limited segment of the public. There is a clear demarkation and distinction between the transportation of property and the transportation of passengers. There are numerous commodity classifications which the Commission can authorize a carrier to transport as a common carrier, Classification of Motor Carriers of Property, 2 M.C.C. 703, whereas there is only a single category of passenger. A carrier may not be authorized to transport only orthodox Jews of the Hassidic Sect. Thus, when an applicant proposes service designed to meet the right of such people to transportation the Commission should frame a remedy to meet their unique purported need. The remedy is contract carriage as proposed by the Applicant.

Perhaps, the entire position of the Petitioner and Intervenor in this case is best affirmed by the decision cited by Applicant in Armored Carrier Corp. - Extension, 92 M.C.C. 336. Therein, the Commission referred to the history of its holding that carriers engaged in the transportation of valuable commodities requiring armored car service had

previously been found to be serving a single class so that contract as opposed to common carriage was involved. Armored Motor Service Co., Inc. - Conversion Proceeding, 77 M.C.C. 433 (1958). However, in the proceeding appearing at 92 M.C.C. 336, the Commission specifically differentiated between the armored car type of service of such carriers and their transportation of commodities such as business records and documents which did not require an armored car type of service and which service was not confined to a specific single class, namely banks. Thus, the Commission in finding that transportation pertaining to business records by the armored car carriers constituted common as opposed to contract carriage observed as follows:

"The most significant change in the pattern of service rendered by armored carriage operators has been the increasing practice of these carriers to enter areas of transportation in which inherently valuable commodities are not involved."

The Commission there recognized with regard to certain transportation that common as opposed to contract carriage was involved because the service was not a unique and did not involve a single class of shipper. Here, a unique class exists warranting a remedy not geared to the general public, namely contract as opposed to common carriage.

REPLY TO BRIEF OF INTERSTATE COMMERCE COMMISSION

Like the Applicant, the Respondent totally escapes from the fact that the service involved is geared strictly and solely to the orthodox Jewish community and indeed no other segment of the population will be permitted to utilize same.

(1) In short, the Commission in certificating the Applicant has sanctioned in advance an unauthorized act, namely granting a carrier authority to serve the general public when the party has previously announced that it will not serve the general public. It is incredulous that this court would uphold a decision by an administrative agency which affirms in advance admitted unlawful conduct. In this connection, the Commission's reference to Auclair Transportation Inc. v. U.S., 221 F. Supp. 328 (D. Mass., 1963), aff'd 376 U.S. 514 (1966) is totally misplaced. Therein, the Commission and the court simply held that questions pertaining to the legality of a tariff to be filed by an applicant after it receives a certificate were not appropriate issues in a certificate proceeding but rather were proper for consideration in a rate proceeding under Section 216 of the Interstate Commerce Act (49 U.S.C. 316). Here, the entire question pertains to the proposed service and the Applicant admits in advance it will not make available a service within the statutory definition of common carriage (49 U.S.C. 303(a)(14)).

(2) In large part, the Respondent has relied upon the decision in National Bus Traffic Association v. U.S., 284 F. Supp. 270 (N.D. Ill., 1967), aff'd 391 U.S. 468 (1968). As Respondent has stated, the court therein held that "each case must . . . stand on its own facts." On its own facts, the factual situation in the instant case bears little resemblance to the regular route service proposed therein by the Applicant between El Paso, Texas and Los Angeles, California. To be sure, the issue of whether or not the service involved was common carriage was not even advanced in said proceeding and accordingly the decision has no precedent value particularly when you consider that the Applicant here predicated its case on entering into contracts with individual congregations whereas the service proposed in the cited decisions involved per capita transportation over regular routes. On its own facts, the situation at bar is clearly distinguishable since we are concerned not merely with transportation but with transportation which has in and of itself unique religious requirements. There is a massive difference between transporting Spanish speaking people between El Paso and Los Angeles when such service would also be made available to the general public and transporting Hassidic Jews who will be partaking in religious services and observances while in transit and will confine the transportation only to members of their sect.

It is equally arbitrary and capricious for the Commission to grant special operations authority to permit per capita transportation when all

that the Applicant sought was the right to contract with congregations and Yeshivas. By administrative fiat, the Commission again has fashioned a remedy which does not relate to the proposed service.

(3) Respondent's reference to O-J Transport Co. - Common Carrier Application, 120 M.C.C. 699, 705, 1974, aff'd sub-nom O-J Transport Co. v. U.S., 536 F.2d 126 (CA 6 1976) is also totally misplaced. Therein, an applicant on the grounds that he was a black sought a certificate of public convenience and necessity to engage in transportation on behalf of certain automobile companies with regard to certain properties namely automobiles. The application was denied on the grounds that public convenience and necessity did not require the proposed service. The ~~case~~ in no manner or form addressed the issue as to whether or not common as opposed to contract carriage was involved particularly since the applicant did not propose to restrict the service to blacks but rather predicated its application on the grounds that a black person was entitled to a certificate of public convenience and necessity to transport automobiles for the general public.

(4) Respondent has also erroneously cited Suburban Transit Corp., Contract Carrier Application, 106 M.C.C. 763, 772, 773 (1968), wherein a request was made to transport as a contract carrier members of the general public to the Leisure World Community in the State of New Jersey. The proposed service was going to be under contract with Leisure World with regard to a community with a projected population

of 50,000 persons. However, there was nothing unique about the proposed service and accordingly the Commission found that the service was not contract but rather common carriage. The service involved the general public and not members of a Sect who would in transit apply certain religious observances. There was nothing unique about the service in Suburban, supra. Accordingly, the service was found to constitute common carriage.

Parenthetically, it **must** be observed that both the Commission and the Applicant have stressed the fact that Monsey is a community largely restricted to members of the orthodox Jewish Sect and that existing bus service is not directly made available to this community. Aside from the fact that this issue is totally irrelevant as to whether or not the proposed service constitutes common or contract carriage, the fact is there is nothing which would prevent persons who protestants serve in adjoining communities to travel to this limited geographical area to utilize the Applicant's service.

Of over-riding importance, however, is the precedent nature of this decision. For this reason, the National Bus Traffic Association petitioned to intervene in the proceeding after the grant of special operations authority. (R.52) The nature of the service proposed and authorized is independent of question of availability of existing facilities. Thus, a grant of special operations authority as a common carrier on the basis of support by a group whose unique transportation require-

ments are not being fulfilled can undermine all existing common carrier services. Any carrier will be in a position to receive special operations authority as a common carrier by establishing a unique need which is not being fulfilled, but the grant of authority will enable the Applicant to undertake basic common carrier services, including commuter transportation, Hudson Transit Lines, Inc. v. U.S., 314 F. Supp. 197 (D.C.N.J. 1970), all in direct competition with services which have not been shown to be inadequate.

(5) Both the Commission and Applicant have sought to denigrate the citation by Petitioner of the decision of the Commission in Delval Coach - Contract Carrier Application, 119 M.C.C. 570, 574 (1974) which was attached as Appendix B to Petitioner's brief. The long and short of the matter is that the reasoning set forth therein is clearly applicable herein since the Commission specifically stated that contract carriage is involved where we are concerned with members of a limited class clearly by some special circumstance and aspect of their business activity and transportation requirements.

It ill-behoves the Commission to argue at Page 26 of its brief "At best, petitioner has attempted to prove that the Commission was not compelled by its earlier holdings to conclude that applicant's proposed operation did not constitute contract carriage." However, the Commission is compelled to explain in detail its arbitrary and capricious departure from the decisional standards which it itself

has enunciated and applied in other situations which situations did not entail such all pervasive unique requirements with which we are here concerned. To be sure, the class concept is totally independent of the question of the number of contracts outstanding as evidenced by the Commission's rejection of the class concept in proceedings where numerous contracts were outstanding, Umthun Trucking Co. - Extension - Phosphate Feed Supplement, 91 M.C.C. 691, 696. As indicated in Del-Val, supra, the question is not the number of contracts but rather whether one is concerned with "members of a limited class clearly defined by some special circumstance or aspect of their business activity and transportation requirements." The fact that the Commission in Del-Val was only concerned with four contracts but nevertheless addressed this issue confirms the position of Petitioner that regardless of the number of contracts that in a situation such as the case at bar one is concerned with contract carriage. If the Commission could find in DelVal that the service proposed therein constituted contract carriage when one was merely concerned with members of the general public residing in four apartment houses, then most assuredly it was arbitrary and capricious for the Commission to here find that one is concerned with common carriage when we are not concerned with the general public but rather with Hassidic Jews who admittedly will apply their religious observances, customs and traditions.

In Storch Trucking Company, Inc. Conversion Proceeding,

82 M.C.C. 777, 781 (1960), it was said:

"It was there (Armored Motor Service) held that 'a limited number of persons' as specified in the definition of a contract carrier does not necessarily mean an arbitrary figure which must be constant and not exceeded; but rather it is a figure determined after consideration of the factors and circumstances surrounding a particular operation or type of motor carrier service. Some of the factors to be considered are the different types of commodities transported, the number of permits held by the carrier, the territory in which the operations are conducted, the degree of specialization required by the nature of the business of the shippers involved, and the degree of similarity in the services the carrier performs under its effective continuing contracts." (Emphasis supplied)

In Storch, the carrier had 46 contracts and was negotiating new ones at the time the Commission instituted the proceeding to determine Storch's proper status as a contract carrier. The facts found were such as to cause the Commission to find that the carrier was holding itself out to the general public and was intending to operate as a common carrier. However, the specialized nature of the service to be provided by Monsey Transportation Corp. to a class of persons, i.e., special provisions for religious activity aboard the bus while in transit and for separate seating of men and women, brings the instant application well within the guidelines of Armored Motor Service and the cases following that decision.

(6) With regard to the entire question of the adequacy of service, it is respectfully submitted that in no manner or form did the

Commission in its findings or deliberations consider the clear differentiation between special and charter operations as a common carrier as opposed to regular contract carriage rights. To be sure, as Petitioner has previously argued the right to engage in special operations as a common carrier authorizes a party to engage in so called commuter transportation on an unlimited extent other than the regular route restriction (Hudson Transit Lines, Inc. v. U.S., 314 F. Supp. 197 (D.C.N.J. 1970)). Thus, common carriage in special operations authorizes service to the general public, a service not contemplated by this application and contrary to the statutory definition. It is no answer to state that protestant's buses do not serve the exact geographical boundaries of this community when in fact protestant's buses serve the general area and further and more important those supporting the application have testified that they are not interested in using protestant's services because protestant's services do not allow them to partake in their religious beliefs while in transit. Such being the case, the question as to whether or not protestants serve the involved boundaries of Monsey is irrelevant to the issues at bar and the case must be addressed on the question as to whether or not the statutory definitions have been complied with.

(7) The seminal issue to have been addressed by the Commission was whether or not the proposed service meets the statutory de-

definition of common carriage and not whether or not a need exists for the proposed service and thereafter to engage in a line of reasoning which justifies the non-legal approach to the issues in the proceeding.

It is undisputed, as stated on page 28 of the Commission's brief, that the "Administrative Law Judge's adopted statement of fact adopted by the Commission in its order found that applicant will provide a unique and highly specialized service designed to meet the peculiar transportation needs of the orthodox Jewish community of Monsey". In short, the statutory test pertaining to contract carriage and the unique aspect of such proposed transportation as prescribed in Section 209 of the Interstate Commerce Act (49 U.S.C. 309) was met by the applicant. It is incongruous for the Commission to then find that such a unique and highly specialized service designed to meet such special requirements can constitute common carriage when in fact the Commission on page 14 of its brief asserts that "every common carrier has a duty to serve equally and fairly all those who request (its) service, subject to the limitations of each carrier's authority and ability. . . .". Here, the applicant does not propose to serve equally the entire public and does not even propose to serve the entire public. It is little solace to suggest that protestants are protected by restricting the Applicant to a given area of the community of Monsey wherein the orthodox Jews reside when in fact

residents of adjoining communities could travel to Monsey and secure the Applicant's service. It was never contemplated that the Applicant would be in a position to attract passengers from adjoining communities by serving the general public.

(8) By the same token, the following argument of the Commission on page 18 of its brief is totally unrealistic and disregards ordinary common sense: "The fact that members of the Orthodox Jewish community may engage in prayer or study while in transit clearly does not constitute any discriminatory action on the part of the applicant, and any prejudice this may have on members of the general public is wholly speculative." So too, the same argument can be made with regard to the fact that the applicant requires women to sit separate and apart from men. Although the Commission asserts on page 18 of its brief that "nor is there any testimony that religious services would be conducted in transit," the Applicant at page 6 of its brief asserts ". . . separate seating of men and women, as well as special seating for prayers and study, would be provided aboard the buses." It is respectfully submitted that such a bus operation is not common carriage and violates the prohibitions on common carriage prescribed by Section 216(a) of the Interstate Commerce Act. (49 U.S.C. 316(a)). It is respectfully submitted that the Commission is conveniently seeking to escape from the evidence and Applicant's pleadings in order to sustain an arbitrary and capricious order.

CONCLUSION

The Order of the Interstate Commerce Commission and the Certificate of Public Convenience and Necessity issued thereunder should be vacated and set aside and the proceeding remanded to the Commission.

Respectfully submitted,

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AFFIDAVIT
OF SERVICE
BY MAIL

STATE OF NEW YORK,
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Jerry N. Simmons
, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 40-04 Vernon boulevard, long Island City, New York.
That on May 23, 1977, he served 2 copies of
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by depositing the same, properly enclosed in a securely-sealed
post-paid wrapper, in a Branch Post Office regularly maintain
the United States Government at 350 Canal Street, Borough of Manhattan,
City of New York, addressed as above shown.

Sworn to before me this
23rd day of May, 1977

.....
[Signature].....

[Signature]
JOHN V. BRONFELD
Notary Public, State of New York
No. 30-0032350
Qualified in Nassau County
Commission Expires March 30, 1979